

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MAGGIE DAVIS

Claimant

VS.

FIBER GLASS SYSTEMS LP

Respondent

AND

ACE-AMERICAN INSURANCE CO.

Insurance Carrier

Docket No. 1,020,300

ORDER

Respondent and its insurance carrier (respondent) request review of the February 2, 2005 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

At the preliminary hearing, the claimant requested medical treatment and temporary total disability compensation for repetitive injuries suffered through claimant's last day worked on September 21, 2004. Claimant alleged she injured her right shoulder on two specific occasions as well as suffering a progressive worsening of her shoulder condition each and every day worked.

The respondent denied notice of the two specific traumatic injuries, noted it had sent claimant to a physician who had opined claimant was not in need of medical treatment, and further denied claimant had suffered worsening of her condition as she continued working after the specific injuries. Consequently respondent argued claimant failed to provide timely notice of the two specific injuries and further failed to meet her burden of proof that she suffered repetitive trauma that worsened her condition as she continued working after the two specific injuries.

The Administrative Law Judge (ALJ) ordered respondent to provide claimant with a list of three physicians from which claimant would choose the authorized treating physician. The ALJ further determined claimant was entitled to temporary total disability benefits. Implicit in the ALJ's Order is a finding that claimant suffered compensable injury and provided respondent timely notice.

The respondent requests review of the following: (1) whether claimant gave timely notice of the two specific traumatic injuries; (2) whether the claimant sustained additional injury each and every day she worked; and, (3) whether the claimant is entitled to temporary total disability benefits.

Initially, claimant requests that the Board dismiss respondent's appeal because it does not raise any jurisdictional issues. In the alternative, claimant argues she not only gave notice of the specific injuries, but also met her burden of proof that she suffered repetitive trauma injuries through her last day worked. Consequently, claimant requests the Board affirm the ALJ's Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant argues the respondent's appeal should be dismissed because the only disputed issue at the preliminary hearing was whether claimant should receive medical treatment. Although respondent's counsel made some closing comments to that effect, it is clear from other closing comments as well as the presentation of evidence and cross-examination of claimant, that respondent denied timely notice of the two specific accidental injuries as well as whether claimant had suffered repetitive injuries through her last day worked. Whether claimant provided timely notice as well as whether claimant suffered accidental injury arising out of and in the course of employment are both jurisdictional issues subject to Board review from a preliminary hearing. The claimant's motion to dismiss the respondent's appeal is denied.

Claimant described an incident at work in the fall of 2003, where she experienced a popping in her right shoulder as she lifted a pipe. She notified her supervisor and was told to try to work through it. Claimant hoped that her shoulder pain would improve, but instead it worsened as she continued working. In May of 2004, the claimant fell while carrying a length of pipe and again hurt her shoulder. She again notified her supervisor of the incident and that her shoulder had not gotten better since the incident in the fall of 2003. She told her supervisor that her shoulder was hurt, and if it kept getting worse she would have to seek medical treatment.

As claimant continued working, she noted her shoulder symptoms worsened, but she did not request medical treatment until the day after she was laid off. She explained

that there was an increased workload because the plant had changed ownership and she feared she would lose her job if she pursued medical treatment.

Claimant's supervisor testified that he did not remember whether claimant had told him about either the accident in the fall of 2003 or in May of 2004. This testimony does not contradict claimant's assertion that she notified the supervisor of the two incidents. The Board finds claimant provided timely notice of her accidental injuries in the fall of 2003 and in May of 2004. Moreover, the Board finds claimant has met her burden of proof that her condition worsened from repetitive trauma injuries suffered each and every day worked through her last day of employment with respondent. It is undisputed that claimant gave timely notice of such repetitive injuries.

Finally, the respondent argues that the ALJ does not have the authority to order temporary total disability benefits where it is shown that the claimant has received unemployment benefits for the same time period she alleges entitlement to temporary total disability compensation. Respondent contends such evidence is obviously inconsistent with the assertion that the claimant is temporarily and totally disabled. It does not, however, establish in all cases that the claimant is not temporarily and totally disabled. An order for temporary total benefits, even in light of such testimony, does not exceed the jurisdiction of the administrative law judge and accordingly is not subject to review on appeal.

This is an appeal from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing issues and findings is generally limited to the following:

- (1) Did the worker sustain an accidental injury?
- (2) Did the injury arise out of and in the course of employment?
- (3) Did the worker provide timely notice and timely written claim?
- (4) Is there any defense to the compensability of the claim?¹

Additionally, the Board may review any preliminary hearing order where a judge exceeds his or her jurisdiction.² Jurisdiction is generally defined as authority to make inquiry and decision regarding a particular matter. The jurisdiction and authority of a court to enter upon inquiry and make a decision is not limited to deciding a case rightly, but

¹ K.S.A. 44-534a(a)(2).

² K.S.A. 2003 Supp. 44-551(2)(A).

includes the power to decide it wrongly. The test of jurisdiction is not a correct decision, but the right to enter upon inquiry and make a decision.³

An ALJ has the jurisdiction and authority to grant or deny temporary total disability benefits at a preliminary hearing. Therefore, the Judge did not exceed her jurisdiction. The issue of whether claimant's medical condition and employment situation entitles claimant to receive temporary total disability benefits is not an issue that is reviewable from a preliminary hearing order. At this juncture of the proceeding, the Board does not have the authority to reweigh the evidence and redetermine if claimant is temporarily and totally disabled.

The Board finds that the ALJ did have the jurisdiction to decide claimant's entitlement to temporary total disability compensation at the preliminary hearing, and that it does not have jurisdiction to consider that issue at this time. The respondent's appeal as to that issue is, therefore, dismissed.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.⁴

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated February 2, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2005.

BOARD MEMBER

c: Dennis L. Phelps, Attorney for Claimant
Richard J. Liby, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

³ See *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Provance v. Shawnee Mission U.S.D.* No. 512, 235 Kan. 927, 683, P.2d 902 (1984).

⁴ K.S.A. 44-534a(a)(2).